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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 129

JAMES JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

CHARLES J. MONAHAN, AND
SARSFIELD COLLINS,
Attorneys for Petitioner.

THE SUNNYSIDE-GUERIN PRINTING COMPANY, CHICAGO

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PETITION FOR CERTIORARI.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner seeks this Court's Writ of Certiorari to reverse the judgment of the United States Court of Appeals for the Seventh Circuit in its affirmance of petitioner's conviction and sentence of fifteen years imprisonment and a fine of $2,000.00 imposed upon him in the District Court following a trial under an indictment charging violations of Title 26, Chapter 23, Narcotics, and 21 U. S. C. Sec. 174 Narcotic Drug Import & Export Act.

The decision of the Appeals Court in holding that an unauthorized arrest of petitioner was lawful thereby opened the door for the admission of incriminating evidence unlawfully taken from his person and premises under a search justified as an incident to his arrest, in violation of petitioner's rights under the fourth amendment to the constitution.

The indictment was returned July 26, 1951, and contained 15 Counts, which charged violations in five Counts of the purchase provisions of the Harrison Narcotic Act, 26 U. S. C. Sec. 2553 (a), in five other Counts, violations of the sales provisions, 26 U. S. C. Sec. 2554 (a) and in the remaining five Counts, violations of the Narcotic Drug Import and Export Act, 21 U. S. C. Sec. 1740. A bench warrant was issued forthwith to the Marshal and delivered to him for execution.

On the same day Federal Narcotic Agents procured a search warrant from the U. S. Commissioner directed to them, authorizing a search of the first floor of the premises known as 5420 Indiana Avenue, Chicago, which was a rooming house and in which petitioner had a room, and proceeded to said address. Entering the building five in number, they came upon petitioner in the hall just after he left the apartment in which he had a room, displayed guns and forced him back into the apartment, searched his person and his room and found a quantity of contraband narcotics and some identified U. S. currency.

October 12, 1951 petitioner filed a written motion to quash the search warrant and suppress as evidence the fruits of the search, also for the return of the non-contraband articles and currency seized, also U. S. currency and non-contraband articles seized in a search by the narcotic agents, of petitioner's dwelling, for which the narcotic agents had no search warrant or other process, and which was a distance of over two miles from the premises designated in the search warrant and for the return of his automobile, which had also been seized by them and taken away.

The government filed an answer conceding that the search warrant was void but maintained that the search was not made under the search warrant but was made as incident to a lawful arrest of defendant. A sworn return to the

search warrant listing the articles seized was made by an agent and a copy thereof delivered to petitioner. The Marshal made a return to the Bench Warrant, stating that he had executed it on the day following the search.

Briefs were submitted to the trial judge on the question of the authority of the narcotic agents to make arrests and execute warrants of arrest. Hearings were had before the trial judge who ruled that the arrest and search by the agents were lawful notwithstanding the search warrant and denied the motion. The motion was renewed at the outset of the trial. Upon the trial by a jury on April 2, 1952 articles and property taken in the search of defendant's person and at the premises described in the search warrant were received in evidence over petitioner's objection. A verdict of guilty was returned, upon which the court imposed a sentence of 15 years imprisonment, and fine of $2,000 and costs.

On appeal to the U. S. Court of Appeals for the Seventh Circuit, the authority of the agents to make the arrest and the admissibility of the evidence seized as an incident to the arrest was argued both by petitioner and respondent in their briefs as well as upon oral argument before the Court. When the court during the oral argument inquired if the authority of the agents to make arrests had been raised in the trial court, petitioner's counsel answered in the affirmative and counsel for the government acquiesced, thereby apprising the Court of the fact that the question had been presented to the trial judge.

The Court of Appeals in a decision dated February 20, 1953 stated that the record did not disclose that the question of the authority of the narcotic agents to make the arrest had been raised in the trial court and refused to consider it and affirmed the conviction.

The knowledge that the record did not disclose that the

point was raised in the trial court first came to petitioner's counsel when he was apprised of it by the court's opinion, whereupon within the time allowed for filing a petition for rehearing, petitioner's counsel obtained from the official court reporter who reported the proceedings before the trial court on January 10, 1952, a supplemental transcript showing said point was argued and discussed before the court and that the court had then and there passed upon the question and held the agents had authority to make the arrest.

Thereafter a motion was made for leave to file said supplemental transcript of proceedings in the Court of Appeals, under Rule 75h, Federal Rules of Civil Procedure, 28 U. S. C. A. and Rule 39(1), Federal Rules of Criminal Procedure, 18 U. S. C. A. and the transcript was filed in the Court of Appeals.

In its first opinion, February 20, 1953, the Court of Appeals held in effect that narcotic agents came within the category of "officers authorized by law" to execute warrants (of arrest) as authorized by Rule 4 (c) (1) Federal Rules of Criminal Procedure and that a search following such arrest was lawful.

In the same opinion the Appeals Court also held that petitioner consented to the search and thereby waived his rights under the Fourth Amendment to the Constitution.

A supplemental opinion of the Court of Appeals was filed May 19, 1953 in which the court in determining the authority of narcotic agents to make arrests stated that while no statute could be found literally conferring such power upon them, yet they possessed implied powers to do so under certain statutes conferring power upon Internal Revenue Agents to make arrests, which powers of the Internal Revenue Agents had been conferred on narcotic agents under regulations promulgated by the Secretary of the Treasury.

The Court in its supplemental opinion also held that narcotic agents came within the scope of the term "officer" as used in Ch. 38, par. 657, Illinois Revised Statutes 1951, State Bar Ass'n edition, authorizing an "officer" to make an arrest without warrant and as such had the power under State law to make the arrest in question.

BASIS UPON WHICH IT IS CONTENDED THAT THE COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

Jurisdiction is invoked under U. S. C. Title 28, Sec. 1254 (1).

The opinion of the United States Court of Appeals became final by denial of petition for rehearing on the 19th day of May, 1953 and within thirty days prior to the filing of this petition.

THE QUESTIONS PRESENTED.

The questions presented are:

1. Did the Court of Appeals err in holding that Federal narcotic agents have implied power to make arrests under certain sections of the Internal Revenue Act, Title 26 U. S. C. and with it the corollary right to search the person and premises of the one arrested without a search warrant, thus circumventing the provisions of the 4th amendment to the Constitution?

2. Did the Court of Appeals err in construing chapter 38, par. 657, Illinois Revised Statutes, 1951, which defines the authority of "officers" to make arrests without warrants to include Federal Narcotic Agents which construction conflicts with applicable local decisions?

3. Did the Court of Appeals err in construing Rule 4 (C) (1) of Federal Rules of Criminal Procedure as including narcotic agents in the phrase "The warrant shall be executed by a Marshal or *by some other officer author-*

ized by law'', therein following its previous interpretation of the rule as expressed in the case of *United States* v. *Pisano, et al.*, 193 F. (2) 361, 363?

4. Did the Court of Appeals err in affirming the ruling of the District Court holding that Narcotic Agents have the power to make arrest under Federal Law and in overruling petitioner's motion to quash the search warrant and suppress the evidence?

REASONS FOR GRANTING THE WRIT.

1. Error of the Court of Appeals in holding that Federal narcotic agents have implied power to make arrests under certain sections of the Internal Revenue Act, Title 26 U. S. C. and with it the corollary right to search the person and premises of the one arrested without a search warrant, thus circumventing the provisions of the 4th amendment to the Constitution.

2. Error of the Court of Appeals in construing chapter 38, par. 657, Illinois Revised Statutes, 1951 which defines the authority of ''officers'' to make arrests without warrants so as to include Federal Narcotic Agents which construction conflicts with applicable local decisions.

3. Error of the Court of Appeals in construing Rule 4 (C) (1) of Federal Rules of Criminal Procedure to include narcotic agents in the phrase ''The warrant shall be executed by a Marshal *or by some other officer authorized by law''*, therein following its previous interpretation of the rule as expressed in the case of *United States* v. *Pisano, et al.*, 193 F. (2) 361, 363. (Emphasis supplied.)

4. Error of the Court of Appeals in affirming the ruling of the District Court holding that Narcotic Agents have the power to make arrest under Federal Law and in overruling petitioner's motion to quash the search warrant and suppress the evidence.

5. The Court of Appeals has decided the foregoing questions of federal law which have not been but which should be decided by this Court.

Wherefore, it is respectfully submitted that this petition for the Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

JAMES JONES, *Petitioner,*
By CHARLES J. MONAHAN AND
SARSFIELD COLLINS,
His Attorneys.

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BRIEF IN SUPPORT OF PETITION.

THE OPINION BELOW.

The opinions of the Court below are as yet unreported. They appear at pages 175 to 181 and 209 to 218 of the record.

THIS COURT'S JURISDICTION.

This Court has jurisdiction to review the judgment in question under 1254(1) of the Judicial Code, Title 28, U. S. C. A. Sec.

Rehearing in this case was denied on May 19, 1953, and within thirty days of the filing of this Brief.

ERRORS TO BE URGED.

The Court of Appeals erred in affirming the judgment of the District Court.

1. In holding the following statutes contained implied powers authorizing the arrest of petitioner by the narcotic agents: Sections 3601, 3654, 3720, 4003, 2827, 2828, 2839, 2857, 2830 and 3121 of Title 26, U. S. C. (said sections relate to powers and duties of Internal Revenue agents which have been conferred upon narcotic agents under regulations promulgated by the Secretary of the Treasury).

2. In construing Ch. 38, Par. 657, Illinois Revised Statutes, 1951, to include Federal Narcotic Agents among those authorized to make arrests in the State of Illinois.

3. In construing Rule 4 (C)(I) Federal Rules of Criminal Procedure as authorizing narcotic agents to execute warrants of arrest.

4. In affirming the ruling of the District Court holding that Narcotic Agents have the power to make arrest under Federal Law and in overruling petitioner's motion to quash the search warrant and suppress the evidence.

ARGUMENT.

I.

THE COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT OF THE DISTRICT COURT IN HOLDING THE FOLLOWING STATUTES CONTAINED IMPLIED POWERS AUTHORIZING THE ARREST OF PETITIONER BY THE NARCOTIC AGENTS: SECTIONS 3601, 3654, 3720, 4003, 2827, 2828, 2839, 2857, 2830 AND 3121 OF TITLE 26, U. S. C. (SAID SECTIONS RELATE TO POWERS AND DUTIES OF INTERNAL REVENUE AGENTS WHICH HAVE BEEN CONFERRED UPON NARCOTIC AGENTS UNDER REGULATIONS PROMULGATED BY THE SECRETARY OF THE TREASURY).

A search warrant was issued in this case and the agents made a sworn return thereo, listing various items of contraband property, which the return stated was seized under the warrant. (R. 13-14.)

Petitioner in apt time made a written motion to quash the warrant and suppress the evidence seized under it. (R. 9, 10, 11.)

Petitioner's motion also included a request that property taken from the person of petitioner be returned as the warrant made no provision for the search of his person.

The motion also included a request that non-contraband property and money seized in a search of petitioner's dwelling be returned, as the narcotic agents had no search warrant authorizing them to search the house, which was situated a distance of at least two miles from the rooming house in which they took petitioner into custody.

The search of petitioner's dwelling without a search warrant was a flagrant violation of Title 18 U. S. C. Supp. 111, section 2236 which makes it an indictable offense and

punishable by fine of not more than $1,000.00 for a federal agent to search a dwelling without a search warrant. This conduct on the part of the agents discredits their testimony that they complied with the provisions of 4 (C) (3) relating to the method required for the execution of a warrant of arrest. When the arresting officers do not have the warrant in their possession the rule requires that the arresting person shall inform the person arrested of the offense charged and the fact that a warrant had been issued for him.

This, the agents pretended they had done at the time they took petitioner into custody. (R. 32.) If the agents were conversant with said rule, it is highly improbable they were not also familiar with the statute which makes it an offense for a federal officer to search a dwelling without a search warrant. In either event, it shows their overzealousness to convict petitioner and to testify to whatever was necessary "to make the shoe fit the foot."

The Government being obliged to concede that the search warrant was void then shifted its position, notwithstanding that the agents had made a sworn return to execution of the search warrant, listing the property seized. It then maintained that the search was not made under the warrant but was made as an incident to a lawful arrest. (R. 15.)

Petitioner then urged that narcotic agents had no power to make the arrest. (R. 190-192.) The District Court held (R. 30), that the arrest and search was legal, notwithstanding the void search warrant, and stated that although no statute could be found expressly authorizing the narcotic agents to make the arrest, the District Court thought the arrest and search to be legal on the authority of *U. S.* v. *Pisano, et al.*, 193 F. (2), 361-363 (C. A. 7).

In the instant case the Court of Appeals has rendered

two opinions. The first (R. 175-181), dated Feb. 20, 1953, and the second (R. 209-217), May 19, 1953. In the first opinion the Court of Appeals stated that the right of narcotic agents to make arrests had not been raised in the District Court, forgetting that it had been informed during oral argument that the question had been raised in the District Court. That such question was raised first in the District Court is apparent from the supplemental transcript filed in the Circuit Court of Appeals. (R. 190, 191-192.)

The Court of Appeals has stated in its opinion that there is no statute literally conferring the right of arrest upon narcotic agents, but that under the various statutes referring to the general broad powers conferred on internal revenue agents which have been conferred upon narcotic agents under regulations of the Secretary of the Treasury, a clear intent was evinced to include the power to arrest.

The various statutes cited by the Court of Appeals in its opinion set forth powers and duties that are clear and specific, and do not admit of any construction.

In referring to section 3654 (c) Title 26, U. S. Code, cited by the court in the second opinion, as conferring implied powers of arrest, the Court overlooked the fact that provisions of paragraph (a) of said section enumerating the powers conferred, which reads as follows:

> "For such purpose he shall have power to examine all persons, books, papers, accounts and premises, to minister unto and to summon any person, to produce books and papers, or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as provided in section 3615."

do not include the power to arrest.

The enumeration of powers and duties conferred in the

above section implies the exclusion of all others not expressly enumerated. If present laws are deficient in not authorizing narcotic agents to make arrest, the remedy lies with Congress and not with the courts by judicial interpretation.

That Congress has seen fit to vest the power of arrest in certain officers by the enactment of specific statutes granting that power is evident from the following:

United States Statutes:

Title 18, U. S. Code, Supp. 111:

Sec. 3052 empowers agents of F. B. I. to serve warrants to make arrests without warrants.

Sec. 3053, Title 18 empowers U. S. Marshals to make arrests without warrants in certain cases.

Sec. 3054, Title 18 empowers agents of Secretary of Interior and Customs officers to execute warrants and make arrests without warrants.

Sec. 3055, Title 18 empowers officers assigned to suppression of liquor traffic to execute warrants and other law precepts.

Title 28, U. S. Code:

Sec. 503 empowers U. S. Marshals to execute all lawful precepts issued under authority of the United States.

Sec. 504 confers same powers on U. S. Marshals in executing laws of U. S. as Sheriffs have under state law.

Inasmuch as it is admitted by the Court of Appeals that there is no literal statutory authority granting the power of arrest to narcotic agents, it is logical to contend that since Congress has seen fit to grant this statutory power only by special statute, the narcotic agents can of necessity have no right by implication to use the power of arrest in the absence of a special statute conferring that power upon them.

To authorize F. B. I. agents to carry firearms, serve

subpoenas, make arrests and execute warrants of arrest required special legislation of Congress. Title 18, U. S. C. Supp. 111, Section 3052, *United States* v. *Coplon*, 185 F. 2, 629, 634.

To authorize internal revenue agents to obtain a search warrant for the search of premises it was necessary that they make oath in writing that they have reason to believe and did believe that a fraud upon the revenue had been or is being committed upon or by the use of the premises and thereafter the warrant was issued by a judge of the District Court or a United States Commissioner. Title 26, Sec. 3602. If the right to have a search warrant issued was limited and restricted, surely Congress did not intend that the power to arrest was to be left unlimited and unrestricted and to be appropriated by federal officers under the theory that this power had been conferred upon them by implication.

In *United States* v. *Di Re*, 332 U. S. 581, at page 591, the Court stated:

> "No act of Congress lays down a general rule for arrest without warrant for Federal offenses. None purports to supersede State Law."

In that case the arrest for a Federal offense, (possessing counterfeit gasoline ration coupons) was made by a State officer accompanied by Federal officers *who had no power of arrest.* (Emphasis supplied.)

There the Court held that the arrest and search of Di Re was illegal under New York State law for want of probable cause. In the instant case the arrest was made by Federal Narcotic Agents, who, at the time, under the Illinois Statute were but private persons, and as such had power to arrest only in cases where a criminal offense had been committed or was attempted to be committed in their presence. Such are not the facts in this case as no criminal offense had been committed or was attempted to be com-

mitted in their presence by Petitioner at the time of his arrest.

The Illinois Statute does not follow the common law which permits private persons to make arrest on probable cause.

Enright v. *Gibson,* 219 Illinois Supreme 550 at page 554.

Dodds et al. v. *Board,* 43 Illinois Supreme, page 95 at page 98.

II.

THE COURT OF APPEALS ERRED IN CONSTRUING CHAPTER 38, PARAGRAPH 657, ILLINOIS REVISED STATUTES, 1951, TO INCLUDE FEDERAL NARCOTIC AGENTS AMONG THOSE AUTHORIZED TO MAKE ARRESTS IN THE STATE OF ILLINOIS.

It is true that under Illinois Law an officer may make arrest without a warrant where a crime has been in fact committed and he has reasonable grounds for believing that the person to be arrested has committed it.

Chapter 38, Paragraph 657, Ill. Rev. Stats., 1951 provides that an arrest may be made by an officer or by a private person without warrant for a criminal offense committed or attempted in his presence and by an officer, when a criminal offense has in fact, been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

As used in the statutes of Illinois, the word officer has reference to Peace officers, sometimes called conservators of the Peace and does not include a Federal Narcotic Agent over whom the State has no jurisdiction. This construction is apparent from an examination of the accompanying sections of this same division of the Statute wherein the rights, duties and obligations of Sheriffs, Constables, and other peace officers are set forth.

As defined by the United States Statute, Title 1, Section 1, U. S. C. an officer is:

> "Reference to any officer shall include any person authorized by law to perform the duties of such office."

Thus, a Federal Narcotic Agent is under Section 1—Title 1, U. S. C., an officer of the United States and not an officer under the Illinois Statutes. A Federal Narcotic agent under Illinois Law is but a private person and as such has authority under the Illinois Statute to make an arrest only when a crime has been committed or attempted to be committed in his presence.

The Court of Appeals following the authority of *U. S.* v. *Di Re,* 332 U. S. 581, 589, has held in its second opinion (R. 211):

> "In absence of an applicable federal statute, the law of the state where an arrest without warrant takes place determines its validity."

If, therefore, the arrest of petitioner is to be a legal arrest it must be within the terms of the Illinois Statute and the Federal Narcotic agents under the Illinois Statute being but private persons their authority to arrest petitioner was restricted to the provisions of the Illinois Statute. Petitioner having committed no crime in the presence of, or attempting to commit a crime in the presence of the Narcotic agents, they as private persons had no power to arrest him. *Enright* v. *Gibson,* 219 Ill., p. 554; *Dodds et al.* v. *Board,* 43 Ill., p. 98.

And consequently their search following the illegal arrest was also unlawful and the evidence thereby obtained should not have been admitted in the trial.

In *Enright* v. *Gibson,* 219 Ill. at page 554, the Court there said:

> "The policy of the law in this state seems to be that a citizen must not be permitted to take the law into

his own hands and to make arrests for suspicion or upon probable cause or guilt.

"A citizen may arrest when an offense is committed or attempted to be committed in his presence; so, too may an officer under the same circumstances."

III.

THE COURT OF APPEALS ERRED IN CONSTRUING RULE 4 (C) (1) FEDERAL RULES OF CRIMINAL PROCEDURE AS AUTHORIZING NARCOTIC AGENTS TO EXECUTE WARRANTS OF ARREST.

At the time the Federal Narcotic Agents took petitioner into custody they had a search warrant they believed to be valid. After the motion to quash it was made they learned it was void and only then did they attempt to justify the search as an incident to a lawful arrest made by them under Rule 4 (C) (1) Federal Rules of Criminal Procedure. Careful search evidences there is no statute authorizing Federal Narcotic agents to execute a warrant of arrest. Rule 4 (C) (1) Federal Rules of Criminal Procedure, states:

"1. The warrant shall be executed by a Marshal or some other officer authorized by Law."

The trial Court, counsel for the government, as well as counsel for petitioner were unable to find any authority empowering the Narcotic agents to make the arrest in question (R. 191-2), as they stated during the proceedings on the motion to quash. Counsel for petitioner thereupon addressed to the Commissioner of Narcotics a direct inquiry as to whether there was a law authorizing Narcotic Agents to make arrest. A reply by the assistant Commissioner of Narcotics is as follows:

TREASURY DEPARTMENT
BUREAU OF NARCOTICS
Washington 25

February 27, 1952.

MR. CHARLES J. MONAHAN,
Attorney at Law,
30 North La Salle Street,
Chicago 2, Illinois.

DEAR SIR:

You are advised that we know of no statute in specific terms authorizing agents of the Bureau of Narcotics to execute a warrant of arrest, but these agents may generally arrest upon personal knowledge, or probable cause to believe, that a violation of the narcotic laws has been committed.

Very truly yours,
G. W. CUNNINGHAM,
Acting Commissioner of Narcotics.

The statement in the above letter that "Agents may generally arrest upon personal knowledge, or probable cause to believe that a violation of the Narcotic Laws has been committed" is entirely true under the statutes of those states which follow the Common Law Rule permitting a private person to make an arrest upon probable cause.

The Illinois Statute, however, does not follow the common law rule and allows arrest by private persons only in instances where the offense for which the arrest is being made has been committed or attempted in their presence. Chapter 38, Par. 657, Ill. Rev. Statutes 1951.

In making his ruling that the Narcotic agents had authority to make arrest, the District Judge stated: "but the Court of Appeals is my authority, none other than Judge Major in the *Pisano* case. (R. 191.) (Referring to *U. S.* v. *Pisano,* 193 F. (2) 361, 363 (C. A. 7).)

At Record page 192 the District Court further stated:

"Until you get the Court of Appeals to change that I will have to hold that Narcotic Agents had the right

> to make a legal arrest. I was going to say, if they did not, they should. They should be given authority specifically. The Narcotic Agent to be effective in the performance of his duty in my judgment must necessarily have the right to arrest. If he does not have under the present law they certainly authorized it. In fact Judge Major's ruling in the *Pisano* case will sustain my views. I think it is settled."

We here note that in the *Pisano* case (193 F. (2) 361, 363) the question of the authority of Narcotic Agents to make an arrest was not in issue and was not argued. The Court of Appeals in its first opinion in the instant case (R. 181), in referring to that case stated,

> "No question as to the authority of Federal Narcotic Agents to arrest was raised; the scope of our inquiry was limited to the validity of an arrest without possession of an existing Bench warrant and the reasonableness of the incidental search. We merely assumed without question, as did the parties, that the Narcotic agents possess the power to arrest persons accused of violating the several Narcotic laws."

The admission by the Court of Appeals in thus construing its own opinion in the *Pisano* case, *supra*, makes plain that the *Pisano* decision furnishes no support for either the decision of the District Court or that of the Court of Appeals for the Seventh Circuit in the instant case.

Serious doubts exist that the issue here involved has been settled and determined. That there is need for clarification is evident from the fact that recently in the case of *United States* v. *Waller*, 108 Fed. Supp. 450-453, involving the authority of Narcotic agents, the District Judge, one of the Judges in this Seventh Circuit, cited the *Pisano* case twice, as an authority.

The issues involved in the instant case on appeal are far from being settled and determined by the decision rendered in the *Pisano* case.

IV.

THE COURT OF APPEALS ERRED IN AFFIRMING THE RULING OF THE DISTRICT COURT HOLDING THAT NARCOTIC AGENTS HAVE THE POWER TO MAKE ARREST UNDER FEDERAL LAW AND IN OVERRULING PETITIONER'S MOTION TO QUASH THE SEARCH WARRANT AND SUPPRESS THE EVIDENCE.

The only direct evidence in this case was that of an informer who was an ex-convict and at the time of giving his testimony was himself under Federal indictment for sales of narcotics. (R. 45.) This witness testified he served time in the penitentiary for having received stolen property (R. 45), and had used four aliases. (R. 60.)

The Federal Narcotic Agents attempted to corroborate the evidence of the informer by testifying that they on several occasions had furnished him with currency identifiable by numbers thereon; that some of this currency was found on petitioner at the time of the search of his premises. They further testified as to circumstances attending alleged sales to the informer by stating he had been searched by them prior to the alleged sales by petitioner, and that no narcotics were found upon his person before his meeting petitioner.

The agents also testified that after the informer met Petitioner, he then had narcotics in his possession.

Upon the search of petitioner's person certain sums of this money was taken from him and introduced in evidence over objection of petitioner during trial. Likewise, the property inventoried in the agent's return of the Search Warrant was also over petitioner's objection introduced as evidence during the trial.

Petitioner denied informer's testimony as to all sales (R. 149-50) made to informer.

The evidence against petitioner consisted of the testimony of an indicted informer seeking favor in return for his testimony against petitioner and the indirect corroboration thereof attempted by the narotic agents.

The action of the agents in this case show their testimony should carry little weight. These were the agents who disregarded the law in making a search of petitioner's home without a search warrant or other process which was a violation of Title 18, U. S. C. Supp. 111, Section 2236.

The credibility to be given their testimony may be measured by their shifty and belated attempt to sustain their illegal search in claiming the search was made as an incident to a lawful arrest and not under their void search warrant.

The introduction as evidence of the narcotics seized under the void search warrant was especially incriminating because of Sec. 174, Title 21 U. S. C., which provides that whenever on trial the defendant is shown to have or to have had possession of narcotic drugs, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains possession to the satisfaction of the Jury.

As a result of the admission into evidence at the trial of the illegal evidence, petitioner was not accorded the fair and impartial trial to which he was entitled.

This Court, in *Bollenbach* v. *United States*, 326 U. S. 607 at page 614, stated, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a Jury according to the procedure and standards appropriate for criminal trial in the Federal Court."

In the case of *United States* v. *Raub*, 177 F. 2d 312, the defendant failed to call the attention of the District Court to error in the instructions to the Jury and the Court of Appeals for the Seventh Circuit on appeal held, at page

316, "We think this error so affects the substantial rights of defendant as to warrant our noticing it in spite of his failure to call it to the attention of the trial Court" and cited the *Bollenbach* case.

In the instant case on appeal, the question of the authority of narcotics agents to make arrest was raised and passed upon by the trial court. Due to the illness of the Official Court Reporter, who took the proceedings, the original transcript failed to show that this point was raised.

The supplemental transcript filed shows that the point was raised and passed upon by the trial court. (R. 190, 191, 192.) It was stated in *Coplon* v. *United States*, 191 Fed. 2nd 749 at page 760:

> "A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty."

The sentence imposed in the instant case was unduly severe.

In commenting upon the statement appearing in the first opinion of the Court of Appeals that the trial court might very properly have believed that petitioner consented to the search of his room (R. 180), we wish to direct this court's attention to the circumstances immediately preceding that search.

Petitioner testified that when he came out of the door and looked up to the second floor he saw four or five men with drawn pistols (R. 17), and he asked them if they had a search warrant and they answered they had; that they pushed him into a side room of the apartment (R. 18), and one of them said "if you don't tell us where it is, we will bust your head with a blackjack. (R. 18.)"

It is apparent from the foregoing that petitioner submitted to the arrest and search because he was informed they had a search warrant and was threatened with drawn guns and a blackjack. His submission, under the circumstances, cannot be construed as a consent.

In *United States* v. *Olmstead et al.*, 7 Fed. 2d, page 756 at page 762, the Court stated,

> "A submission to search or arrest will not impair the constitutional right and courts will not consider the constitutional rights waived by not contesting by force the assumed right of official conduct."

In *United States* v. *Di Re*, 332 U. S. 581 at 594, this Court stated:

> "One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases. But courts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law. A layman may not find it expedient to hazard resistance on his own judgment of the law at a time when he cannot know what information, correct or incorrect, the officers may be acting on."

We submit that this case warrants the exercise of this Court's supervisory powers and that this petition for a writ of certiorari be granted.

Respectfully submitted,

CHARLES J. MONAHAN,
SARSFIELD COLLINS,
Counsel for Petitioner.

FILED
AUG 20 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 129

JAMES JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITIONER'S BRIEF.

CHARLES J. MONAHAN,
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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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APPENDIX TO PETITIONER'S BRIEF.

The following sections of Title 26, Internal Revenue Code, applying to distilleries and other registered industries, cited in the Court of Appeals Second Opinion, generally by section numbers only, and other statutes and rules cited similarly in petitioner's brief, are as to pertinent provision thereof, hereto appended in full as follows:

SEC. 3601. *Entry of Premises for Examination of Taxable Objects—Authority—Entry During Day.*

(a) (1) Any collector, deputy collector, internal revenue agent, or inspector may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, within his district, so far as it may be necessary for the purpose of examining said articles or objects.

(2) *Entry at Night:* When such premises are open at night, such officers may enter them while so open in the performance of their official duties.

(b) *Penalty for Refusal to Permit Entry or Examination.* Any owner of such building or place, or person having the agency or superintendence of the same, who refuses to admit such officer, or to suffer him to examine such article or articles, shall for every such refusal forfeit $500.00.

SEC. 3602. *Search warrants.*

The several judges of the district courts of the United States, and the United States commissioners, may, within their respective jurisdictions, issue a search warrant, authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises.

SEC. 3654. *General powers and duties relating to collection*—(a) *Collectors.*

Every collector within his collection district shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, books, papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as provided in section 3615.

(b) *Deputy collectors.*

Every deputy collector shall have the like authority in every respect to collect the taxes levied or assessed within the portion of the district assigned to him which is by law vested in the collector himself; but each collector shall, in every respect, be responsible, both to the United States and to individuals, as the case may be,

for all moneys collected, and for every act done or neglected to be done, by any of his deputies while acting as such.

(c) *Internal revenue agents.*

Every internal revenue agent shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto.

SEC. 3720. *Seizure of forfeitable property*—(a) *Property subject to seizure and forfeiture*—(1) *Manufactured articles.*

All goods, wares, merchandise, articles, or objects on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized, and shall be forfeited to the United States.

(2) *Raw materials.*

All raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax, may also be seized, and shall be forfeited as aforesaid.

(3) *Equipment.*

All tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized, and shall be forfeited as aforesaid.

(b) *Authority to make seizures*—(1) *Collectors and deputy collectors.*

Such property may be seized by the collector or

deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner for that purpose.

(2) *Other internal revenue officers.*

Any officer of internal revenue may be specially authorized by the Commissioner to seize any property which may by law be subject to seizure, and for that purpose such officer shall have all the power conferred by law upon collectors; and such special authority shall be limited in respect of time, place, and kind and class of property, as the Commissioner may specify.

SEC. 4003. *Powers and duties.*—(a) *Entry of premises for examination of taxable objects.*

The agents whose employment is authorized by this chapter shall have all the powers of entry and examination conferred upon any officer of internal revenue by section 3601 and sections 2828, 2839 and 2857, and all the provisions of said sections, including those imposing fines, forfeitures, penalties, or other punishments for the enforcement thereof, shall be applicable to the action of internal-revenue agents, in the same manner as if such agents were specially named in each of said sections.

(b) *Report of delinquency or malfeasance of officers or agents.*

It shall be the duty of every internal revenue agent to report to the Commissioner in writing any neglect of duty, incompetency, delinquency, or malfeasance in office of any internal revenue officer or agent of which he may obtain knowledge, with a statement of all the facts in each case, and any evidence sustaining the same.

(c) *Enforcement of law and regulations.*

For provisions requiring internal-revenue agents to see that all laws and regulations relating to the collection of internal-revenue taxes are complied with, see section 3654(c).

SEC. 2828. *Distillers and rectifiers to furnish facilities and give assistance for examination of premises*—(a) *Power of revenue officers.*

On the demand of any internal revenue officer or agent, every distiller or rectifier shall furnish strong, safe, and convenient ladders of sufficient length to enable the officer or agent to examine and gauge any vessel or utensil in such distillery or premises; and shall, at all times when required, supply all assistance, lights, ladders, tools, staging, or other things necessary for inspecting the premises, stock, tools, and apparatus belonging to such person, and shall open all doors, and open for examination all boxes, packages, and all casks, barrels, and other vessels not under the control of the revenue officer in charge, under a penalty of $500 for every refusal or neglect so to do.

SEC. 2839. *Drawing off water and cleansing worm tubs*—(a) *Requirements.*

Whenever any officer or internal revenue agent requires the water contained in any worm tub in a distillery, at any time when the still is not at work, to be drawn off, and the tub and worm cleansed, the water shall forthwith be drawn off, and the tub and worm cleansed by the distiller, or his workmen, accordingly; and the water shall be kept and continued out of such worm tub for the period of two hours, or until the officer or agent has finished his examination thereof. For any refusal or neglect to comply with any provision of this section, the distiller shall forfeit the sum of not exceeding $1,000; and it shall be lawful for the officer or agent to draw off such water, or any portion of it, and to keep the same drawn off for so long a time as he shall think necessary.

SEC. 2857. *Books of rectifiers and wholesale dealers*—(a) *Requirements.*

Every rectifier and every wholesale liquor dealer who sells, or offers for sale, distilled spirits in quanti-

ties of five wine-gallons or more to the same person at the same time shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: Provided, That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.

SEC. 2827. *Entry and examination of distillery*—(a) *Power of revenue officers.*

It shall be lawful for any revenue officer at all times, as well by night as by day, to enter into any distillery or building or place used for the business of distilling, or used in connection therewith for storage or other purposes, and to examine, gauge, measure, and take an account of every still or other vessel or utensil of any kind, and of all low-wines, and of the quantity and gravity of all mash, wort, or beer, and of all yeast, or other compositions for exciting or producing fermentation in any mash or beer, of all spirits and of all materials for making or distilling spirits, which may be in any such distillery or premises, or in possession of the distiller.

And whenever any internal revenue officer, or any person called by him to his aid, is hindered, obstructed, or prevented by any distiller or by any workman, or other person acting for such distiller, or in his employ, from entering into any such distillery or building or place as aforesaid; or any such officer is by the distiller, or his workman, or any person in his employ, prevented or hindered from, or opposed, or obstructed, or molested in the performance of his duty under the internal revenue laws, in any respect, the distiller shall forfeit the sum of not exceeding $1,000.

And whenever any officer, having demanded admit-

tance into a distillery or distillery premises, and having declared his name and office, is not admitted into such distillery or premises by the distiller or other person having charge thereof, it shall be lawful for such officer at all times, as well by night as by day, to break open by force any of the doors or windows, or to break through any of the walls of such distillery or premises necessary to be broken open or through, to enable him to enter the said distillery or premises; and the distiller shall forfeit the sum of not exceeding $1,000.

SEC. 2830. *Officer's authority to break up grounds or walls* —(a) *Power of revenue agent.*

It shall be lawful for any revenue officer, and any person acting in his aid, to break up the ground on any part of a distillery, or premises of a distiller or rectifier, or any ground adjoining or near to such distillery or premises, or any wall or partition thereof, or belonging thereto, or other place, to search for any pipe, cock, private conveyance, or utensil; and, upon finding any such pipe or conveyance leading therefrom or thereto, to break up any ground, house, wall, or other place through or into which such pipe or other conveyance leads, and to break or cut away such pipe or other conveyance, and turn any cock, or to examine whether such pipe or other conveyance conveys or conceals any mash, wort, or beer, or other liquor, which may be used for the distillation of low-wines or spirits, from the sight or view of the officer, so as to prevent or hinder him from taking a true account thereof.

U. S. CODE, TITLE 18, SUPP. III, SEC. 2236. *Searches Without Warrant.*

Whoever, being an officer, agent, or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States, searches any private dwelling used and occupied as such dwelling without a warrant directing such

search, or maliciously and without reasonable cause searches any other building or property without a search warrant, shall be fined for a first offense not more than $1,000; and, for a subsequent offense, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

This section shall not apply to any person—

(a) serving warrant of arrest; or

(b) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or

(c) making a search at the request or invitation or with the consent of the occupant of the premises.

ILLINOIS REVISED STAT. 1951. DIVISION VI, CHAPTER 38: SEC. 657. *Arrests Without Warrant.*

An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

SEC. 655. *Duty of officers.*

It shall be the duty of every sheriff, coroner, constable and every marshal, policeman, or other officer of any incorporated city, town or village, having the power of a sheriff or constable, when any criminal offense or breach of the peace is committed or attempted in his presence, forthwith to apprehend the offender and bring him before some justice of the peace, to be dealt with according to law; to suppress all riots and unlawful assemblies, and to keep the peace, and without delay to serve and execute all warrants, writs, precepts and other process to him lawfully directed.

SEC. 654. *Pursuit of felon.*

When the fact that a felony has been committed shall come to the knowledge of any sheriff, coroner

or constable, fresh pursuit shall be forthwith made after every person guilty thereof, by such sheriff, coroner, constable and all other persons who shall be by any one of them commanded or summoned for that purpose; every such officer who shall not do his duty in the premises shall be punished by fine in a sum not exceeding $100, or imprisoned not exceeding three months.

SEC. 658. *Magistrate may make arrest.*

A magistrate may orally order an officer or a private person to arrest any one committing or attempting to commit a criminal offense in the presence of such magistrate, which order shall authorize the arrest.

SEC. 660. *Person arrested to be taken before a magistrate.*

When an arrest is made without a warrant, either by an officer or a private person, the person arrested shall, without unnecessary delay, be taken before the nearest magistrate in the county, who will hear the case, for examination, and the prisoner shall be examined and dealt with as in cases of arrests upon warrant.

FEDERAL RULES OF CIVIL PROCEDURE: RULE 75 (h). *Power of Court to Correct or Modify Record.*

* * * If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court.

FEDERAL RULES OF CRIMINAL PROCEDURE: RULE 39 B (1). *Preparation and Form.*

The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules.

RULE 4. *Warrant or Summons Upon Complaint.* (c) *Execution or Service—Return.*

(1) The warrant shall be executed by a marshal or by some other officer authorized by law. * * *

RULE 9 C. (2) *Return.*

The officer executing a warrant (arrest warrant) shall make return thereof to the court. * * *

RULE 41 (d). *Searches and Seizure, Execution and Return With Inventory.*

* * * The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken.

FEDERAL RULES OF CRIMINAL PROCEDURE. RULE 52. *Harmless Error and Plain Error.* (b) *Plain Error.*

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Respectfully submitted,

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Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 129

JAMES JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the Court of Appeals (R. 175-181) and its opinion on the petition for rehearing (R. 209-217) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1953 (R. 181), and a petition for rehearing (R. 197-208) was denied on May 19, 1953 (R. 217). The petition for a writ of certiorari was filed on June 17, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether narcotic agents are officers authorized to make arrests for violation of federal narcotics laws and conduct a search as incident thereto.

STATUTE AND RULES INVOLVED

Illinois Revised Statutes, chapter 38, section 657 (1951), provides:

> An arrest may be made by an officer or by a private person without a warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

Rule 9 F. R. Crim. P. provides:

> Rule 9. Warrant or Summons Upon Indictment or Information
>
> * * * * *
>
> (c) Execution or Service; and Return.
>
> (1) *Execution or Service.* The warrant shall be executed or the summons served as provided in Rule 4(c)(1), (2) and (3). * * *

Rule 4 F. R. Crim P. provides:

> Rule 4. Warrant or Summons Upon Complaint
>
> * * * * *
>
> (c) Execution or Service; and Return.
>
> (1) *By Whom.* The warrant shall be executed by a marshal or by some other officer authorized by law. * * *
>
> * * * * *

(3) *Manner.* The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. * * *

STATEMENT

An indictment in fifteen counts, charging various violations of the narcotics laws, was returned against petitioner in the United States District Court for the Northern District of Illinois (R. 3-7). A bench warrant for petitioner's arrest and a search warrant for the search of his premises at 5420 Indiana Avenue in Chicago were issued on July 26, 1951, the same date the indictment was returned (R. 8-9, 12-14). Petitioner was arrested by a Federal narcotic agent who did not have the warrant in his possession and narcotics were taken from his person and from the premises which he occupied (R. 107-112, 123-128).

On October 12, 1951, petitioner filed a motion to suppress as evidence the property taken from him on July 26 on the grounds *inter alia* that the search warrant was invalid and that the government agents had no arrest warrant for petitioner (R. 9-11). The Government's answer conceded that there was no valid search warrant since the affidavit on the basis of which it was issued stated no facts justifying its issuance, but alleged that the

search was nevertheless valid as incident to a lawful arrest (R. 15).

At a hearing on this motion to suppress, Krieger, a Treasury enforcement agent, assigned to the Bureau of Narcotics, testified that he and narcotic agent Fields arrested petitioner at his apartment on July 26; that he told petitioner a bench warrant had been issued for his arrest; that upon searching petitioner's person he found four packages of cellophane, containing 431 grains of heroin hydrochloride, and $310, of which $100 was previously identified as Government advanced money. Krieger further testified that when the officers announced they were going to have to look around, petitioner stated he would show them where the "stuff" was, and took from a dresser drawer a lunch box. In this box the officers found a quantity of drugs and drug paraphernalia. (R. 31-34.)[1] The motion to suppress was overruled, on the ground that the arrest was legal and the search and seizure were a lawful incident thereto. The motion to suppress was later revived and overruled at the trial. (R. 30, 42-43.)

Petitioner was found guilty as charged, and was sentenced to 5 years' imprisonment on each of counts 1 through 14 to run concurrently, and 10

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[1] Petitioner testified that on July 26, 1951, four or five men entered the apartment where he stayed as a roomer, put their guns on him, pushed him into a side room, asked "Where is it at?", and stated they had a search warrant. Petitioner testified further that they found a metal box, and in a search of his person, took his wallet containing money. Petitioner denied that the officer taking him into custody stated that a warrant had been filed for his arrest. (R. 17-19, 24-25.)

years and a $2000 fine on Count 15, the sentence on count 15 with respect to imprisonment to commence upon the expiration of sentence imposed on counts 1 to 14 inclusive (R. 159-161). On appeal (R. 162-163) the judgment was affirmed (R. 181).

In its original opinion the court below held that, because petitioner's counsel had not raised the point as to the alleged lack of power of the Treasury enforcement agents or narcotic agents to make the arrest, the court did not reach this question (R. 180). After a supplemental transcript was filed, the court, although adhering to the view that petitioner had abandoned the point that the agents had no power of arrest (R. 211), decided that the narcotic agents had "statutory authority to make the arrest, and, incidentally thereto, to search and seize the articles found on the person of [petitioner] and in his apartment" (R. 217).

ARGUMENT

Petitioner argues that there was no valid arrest to support the search incident thereto because narcotic agents are not "officers" possessing the power to arrest or search. As the court below pointed out, however, by reason of statutory provisions and regulations "narcotic agents have all the authority of Internal Revenue officers" (R. 212-214) with respect to violations of the narcotics laws, a conclusion which petitioner does not dispute.

The powers of internal revenue agents are broad. Under 26 U.S.C. 3654(c) "every internal revenue agent shall see that all laws and regulations relat-

ing to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto." Moreover, in addition to his express statutory powers an officer has such implied powers as are necessary for the efficient exercise of the express powers, or as may be fairly implied from the statute granting the express powers. Throop on *Public Officers,* p. 515, § 542; 2 Lewis, Sutherland on *Statutory Construction,* p. 942, § 508. It is thus clear that narcotic agents have, in relation to violations of the narcotic laws the powers of "peace officers" including the power to arrest and search. Cf. *United States* v. *Daison,* 288 Fed. 199, 203 (E.D. Mich.) holding that prohibition agents had the power of peace officers in relation to liquor laws. The courts, including this Court, have so regarded them without challenge in numerous cases. E.g. *Agnello* v. *United States,* 269 U.S. 20; *United States* v. *Li Fat Tong,* 152 F. 2d 650 (C.A. 2); *Mattus* v. *United States,* 11 F. 2d 503 (C.A. 9).

As peace officers they had the right to make the arrest here involved either under the bench warrant by reason of Rules 9(c) and 4(c)(1) and (3) of F. R. Crim. P., or without a warrant under Illinois Revised Statutes, ch. 38, sec. 657 (1951). Under the Rules they are to be deemed officers "authorized by law". Or, in the alternative, the Illinois statute provides that an arrest may be made without a warrant "by an officer, when a criminal offense has in fact been committed, and he

has reasonable ground for believing that the person to be arrested has committed it." Petitioner's contention that "officer" in the Illinois statutes includes only state officers such as sheriffs and constables, and not federal officers, is untenable (Pet. 16). Admittedly state laws on arrest are passed primarily to cover state officers making arrest for state offenses. But the rationale of *United States* v. *Di Re,* 332 U.S. 581, 589, is that in the absence of a federal statute the state law applies, as to the validity of arrests without warrant, in regard to a federal offense, whether the arrest is made by a state or a federal officer. See also *Coplon* v. *United States,* 191 F. 2d 749, 753 (C.A. D.C.), certiorari denied, 342 U.S. 926; *Dorsey* v. *United States,* 174 F. 2d 899, 901-902 (C.A. 5), certiorari denied, 338 U.S. 950.

CONCLUSION

The decision of the court below is correct and there is no conflict in decisions. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable Justices of Said Court:

Petitioner respectfully petitions this Honorable Court to grant a rehearing of his Petition for Writ of Certiorari heretofore denied by this Court and for such purpose shows to the Court as follows:

I.

The decision of the Court of Appeals contained in its second opinion, dated May 19, 1953, R. 209-217, is in conflict with the respective decisions on the same point of law rendered by two other United States Courts of Appeal, viz., 9th and 5th Circuits in the respective cases of *Alvau*

v. *United States,* 33 F. (2) 467 and *United States* v. *Frisch,* 140 F. (2) 660.

The point not heretofore argued herein, involves the question as to whether certain sections of the Internal Revenue Code, Title 26, U. S. Code, cited by the Court of Appeals for the 7th Circuit in the instant case in said second opinion and set forth in full in an appendix to petitioner's brief, heretofore filed herein apply to illicit unregistered places where taxable commodities are found as they do to legitimate places registered with the Commissioner of Internal Revenue and operated under his supervision.

Said sections of the Revenue Code, Title 26 U. S. Code are as follows: 3601 (a), 3654 (c), 3720 (b), 4003, 2828, 2827, 2839, 2857, 2830 and 3121 (a).

The decision of the Court of Appeals for the 7th Circuit makes no distinction between registered and unregistered establishments and holds that the narcotic agents had statutory powers granted to Internal Revenue agents, by said sections and conferred upon narcotic agents by regulations, to enter petitioner's room in a rooming house and arrest him and search his unregistered premises without a warrant. It is here to be observed that the opinion of the Court of Appeals cites no case in support of its ruling.

The Ninth Circuit Court of Appeals in the case of *Alvau* v. *United States, supra,* 33 F. (2) 467 reversed the lower court's ruling that the sections of the revenue act which the Court of Appeals, in the instant case held confer broad powers of arrest and search upon Internal Revenue Agents, by implication applied to unregistered illicit places as well as legitimate registered ones. As to this ruling the Court said:

"if it be correct it is difficult to conceive of a case where a search warrant would be at all necessary."

and then stated that no case had been called to its attention wherein the ruling of the lower court had been upheld.

Said sections construed by that court are the same as those relied upon by the Court of Appeals in its second opinion in the instant case though they now appear under the above new numbers due to the recodification of the Code.

The Court in reversing the lower court's ruling that the arrest and search were legal cited with approval and adopted the reasoning of two District Courts' opinions in the cases of *United States* v. *Hilsinger,* 284 F. 585, 590 and *United States* v. *Swan,* 15 F. (2) 598 and quoted therefrom as follows:

"This is not thought to warrant a search or seizure elsewhere than in a place like a brewery or distillery, where such articles are avowedly made or kept; that is to say, it is thought that when one avowedly goes into the business of producing such articles, registers his manufactory with the collector of internal revenue, then it becomes subject and he subjects it to the provisions and terms of this statute. This statute is not thought to extend to all places where illegal manufacture is carried on. That would amount to a blanket warrant to search for excisable articles, void under the Constitution. To give this act a constitutional construction it seems to me that it must be restricted to breweries, distilleries, and like places where the manufacture of excisable articles is avowedly carried on." (*United States* v. *Hilsinger,* 284 F. 585, 590).

"The distinction between this case and that of a registered distillery is broad and obvious. One who registers a still in effect consents to its being searched by proper officers at any time. One who does not, gives no such consent, and for this reason the statute has no application to him." (*United States* v. *Swan,* 15 F. (2d) 598).

The rationale of the decision of the Court of Appeals for the 9th Circuit is that said sections of the revenue act apply only to registered industries avowedly conducting their businesses and not to illicit unregistered establishments and hence confer no authority upon agents to make arrests and searches in the latter places.

The 5th Circuit Court of Appeals in *United States* v. *Frisch,* 140 F. (2) 660, 5th Circuit, was a case wherein the question involved was the authority of Internal Revenue agents to search without a search warrant the second floor of a building for taxable liquors in which a registered retail liquor establishment was conducted on the first floor.

The court held that the Revenue Agents had authority to search the first floor to count the taxable liquor stock and to inspect the records the proprietor was bound to keep, but if they desired to search the second floor for further evidence they should have obtained a search warrant as *the law under which they were inspecting the Bar on the first floor expressly provided that a search warrant be obtained:* Internal Revenue Code, Sec. 3601 and 3602, 26 U. S. C. A.

Here again conflict in decision between two Courts of Appeals is apparent. The Fifth Circuit Appeals Court's holding that under these Sections it was expressly necessary to obtain a search warrant, whereas the 7th Circuit Appeals Court in the instant case holds that implied powers to make the arrest and search can be spelt out of the same statute and that no search warrant was necessary.

In view of the foregoing it is respectfully suggested that the question here presented, involving, as it does the circumvention of a constitutional right, is a matter of great public importance and should be settled by this Honorable Court in order to avoid the uncertainty and confusion that will otherwise obtain throughout the various federal courts.

Petitioner respectfully prays that a rehearing of his petition for writ of certiorari may be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL IN SUPPORT OF PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

I, Sarsfield Collins, one of the attorneys for Petitioner in the above entitled cause, do hereby certify that I am familiar with the contents of the within Petition for Rehearing and assisted in its preparation; that said Petition is presented in good faith and not for the purpose of delay and that the matter therein set forth is restricted to substantial grounds not previously argued by petitioner.

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SARSFIELD COLLINS.